

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2851 of 1992

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For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? YES

2. To be referred to the Reporter or not? YES

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? NO

5. Whether it is to be circulated to the Civil Judge? NO

SEJALBEN J SONI

Versus

DIRECTOR OF EDUCATION

Appearance:

MR RA PATEL for Petitioner
Ms.S.D. Talati, ASSTT GOVERNMENT PLEADER
for Respondent No. 1
RULE SERVED for Respondent No. 2
MR ARUN H MEHTA for Respondent No. 3

CORAM : MR.JUSTICE R.A.MEHTA

Date of decision: 01/05/98

ORAL JUDGEMENT :

The petitioner who is a tutor in Economics in respondent no.3- College, has a grievance regarding her pay fixation as on 5.4.1989, the date of her reinstatement, in the pay scale of Rs.2200- 4000/- as per Mehrotra Pay Commission, with the next date of increment

as 8.7.1989 and the previous date of increment as 8.7.1988.

2. The Government Resolution ("GR" for brevity) dated 14th September 1988 gave effect to the revision of pay scales on the recommendations of Mehrotra Commission. The scheme envisaged in Appendix-I to the GR applies to teachers in all affiliated colleges and the revised scales were effective from 1.1.1986. Para 7 deals with revision pay scale of lecturer to Rs.2200- 4000. Para 25 deals with fixation of pay. Para 27 deals with exercise of option, which is relevant provision for our purpose. It gives option to come to the revised pay scale with effect from 1.1.1986 or later date chosen by them. Para 27 reads as follows :

"All the teachers shall have the option to come to the revised scale with effect from 1.1.1986 or from a later date chosen by them. The teachers and other personnel will be required to exercise their option in the form appended to this Resolution within three months from the date of this Resolution. Option once exercised shall be final. If an incumbent has not exercised his option within the prescribed time limit, he shall be deemed to have elected to be governed by the revised pay scales with effect from 1.1.86."

3. The petitioner's services were terminated by the college management in 1976. That termination was challenged before the Gujarat Affiliated College Service Tribunal ("the Tribunal" for brevity) and the Tribunal had by its order dated 19th August 1982 set aside the order of termination. The college management had preferred Special Civil Application No.3852 of 1982. The petitioner too had filed Special Civil Application No.6472 of 1988. Both the petitions were heard together and were disposed of by a common judgment dated 4.4.1989, Annexure 'A' to the petition, directing the respondent college to reinstate the petitioner with full back wages and with continuity of service.

4. In compliance of the judgment the petitioner was reinstated in service from the next date, namely, 5.4.1989. She was not actually in service in 1988 when the teachers and other personnel were required to exercise their option within three months from the date of Resolution dated 14.9.1988. Thus, there was no question of her exercising any option during the period between 14.9.1988 and 14.12.1988 because she was not an

incumbent in service. She had no option and therefore, could not exercise the option within the prescribed time.

5. However, the respondent authorities have deemed the petitioner to have elected and to be governed by the revised pay scale with effect from 1.1.1986 and not from a later date chosen by her.

6. Immediately, on the very day of her reinstatement, namely, 5.4.1989, she has given the option in the prescribed form (page 70) scoring out column 1(a) (revised scale with effect from 1.1.1986) and electing column 1(b) (elect to continue in the existing scale of Rs.700- 1600 until the date of her next increment, i.e. Rs.40 upto 8.7.1986 raising her basic pay to Rs.820/-. This option form was filled in before the Principal.

7. On the basis of the aforesaid Form of Option the Principal had fixed the petitioner's initial pay in the revised scale at Rs.2425/- with effect from 8.7.1986, the date from which the revised scale was opted and the College Principal had issued an Office Order dated 5.4.1989 (page 68) fixing her initial pay at Rs.2425/with effect from 8.7.1986 in the scale of Rs.2200- 4000 with the date of next increment as 8.7.1987. Accordingly the Officer Order had fixed her pay at Rs.2575 per month in the revised scale to be drawn from the month of April 1989, on the basis of the pay fixed as above.

8. The Government has not accepted this pay fixation and instead it has fixed her pay at Rs.2500/- from April 1989. There is, therefore, a difference of one increment of Rs.75/- and this is on account of the difference in the date of increment and the effective date from which the revised pay scale is to be applied in respect of the petitioner.

9. The Government authorities have applied the revised scale with effect from 1.1.1986, whereas the petitioner wanted it to be fixed from a later date chosen by her, namely, 8.7.1986. The Government has refused to take cognisance of the option of the petitioner because it was not exercised within the prescribed time limit of three months from the date of Resolution dated 14.9.1988. Literally, the Government has followed para 27 of the Resolution. The Resolution provides that if the incumbent has not exercised his option within the prescribed time limit, he shall be deemed to have elected to be governed by the revised pay scales with effect from 1.1.1986.

10. It is true that the petitioner had not exercised her option within the prescribed time limit, namely, between 14.9.1988 and 14.12.1988, during which period her services were terminated and she was not an incumbent, who could exercise her option during that period. She came to be reinstated on 5.4.1989 and on that very day she had exercised her option. The question, therefore, is as to whether;

(a) this option could be taken into consideration and given effect to by the opponents, and

(b) the authorities are justified in refusing to take cognisance of that option considering her to be deemed to have elected to be governed by the revised pay scale with effect from 1.1.1986.

11. The deeming fiction of having elected to be governed by revised pay scale with effect from 1.1.1986 presupposes that the teacher is an incumbent and that he could exercise his option and that he had failed to exercise the option and therefore, he was deemed to have elected to be governed by the revised pay scale from 1.1.1986. In the present case both these elements are absent. The petitioner was out of service during the relevant period and she was not an incumbent. She could not have exercised her option at that time and she could not be deemed to have elected to be governed by the revised pay scale with effect from 1.1.1986 because she was not in service either on 1.1.1986, or 14.9.1988 or 14.12.1988. During all this period till 4.4.1989 she had no choice or option to exercise because she was not in service. Therefore, she could not be deemed to have elected to be governed by the revised pay scale from 1.1.1986. This deeming fiction cannot apply to her.

12. When she was reinstated on 5.4.1989, on that very day, without any loss of time she has exercised her option. In such cases, where it was physically, legally and in every manner impossible to exercise any option or impossible to have any option, such person is required to be given a reasonable opportunity to exercise option within a reasonable time. The GR had given time of three months to exercise the option to every incumbent teacher. The petitioner was not in service during the relevant period and therefore, she was not an incumbent. But as soon as she was reinstated and she became incumbent of the post, on that very day she had exercised her option without loss of a single day. Therefore, she cannot be attributed any deeming fiction or she cannot be deemed to have elected revised pay scale with effect from 1.1.1986.

Therefore, the stand of the authorities that she could not have exercised any option on her reinstatement and that she is deemed to be governed by the revised pay scale from 1.1.1986 is highly untenable and contrary to the spirit of para 27 of the GR. Therefore, the pay fixation done on that basis at Rs.2500/- as on 5.4.1989 is required to be modified to Rs.2575/- with the date of next increment as 8.7.1989.

13. The petitioner has also claimed interest at the rate of 18 per cent per annum on the differential amount. The interest is directed to be paid at the rate of 9 per cent per annum.

14. In the result the petition succeeds and the rule is made absolute by directing the respondent authorities;

- (i) to fix the basic pay of the petitioner at Rs.2575/- as on 5.4.1989 in the revised pay scale of Rs.2200- 4000 plus other allowances and service benefits, with the date of next increment as 8.7.1989,
- (ii) to pay to the petitioner whatever differential amount becomes payable with interest at the rate of 9 per cent per annum from 5.4.1989 till the date of payment,
- (iii) to make calculation of the amounts payable to the petitioner in compliance with this direction within the period of three months from today. This calculation shall also include the calculation of interest at 9 per cent per annum,
- (iv) to serve a copy of this calculation to the petitioner within the period of three months from today,
- (v) to make payment in compliance with this direction within the period of four months from today, and
- (vi) that the petitioner will be entitled to cost of this petition from respondent no.1.

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